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No. 77-

MICHAEL RODAK JR. CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

— 77-420

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.,*
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

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Petitioner United States Independent Telephone Association (USITA)¹ respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review the July 28, 1977 decision of that court in this case.

¹ United States Independent Telephone Association (USITA) is the national trade association of the approximately 1,600 "Independent" (not owned by or affiliated with the American Telephone & Telegraph Company) telephone companies in this nation, companies that serve over half the served geographical area of the country with over 28 million telephones and almost \$23 billion in telephone plant.

JUDGMENT BELOW

The July 28, 1977 decision of the Court of Appeals, not yet officially reported, appears as Appendix A to the American Telephone & Telegraph Company (AT&T) petition for certiorari in this case.² The decision of the Federal Communications Commission (FCC), reversed and remanded by the court below, is reported at 60 FCC 2d 25 (1976), and appears as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on the same date as its opinion. Timely motions for stay of mandate pursuant to Rule 41(b), Federal Rules of Appellate Procedure, filed by USITA, AT&T, and FCC, were granted by order entered August 22, 1977.

This petition, filed within the 30-day period prescribed by Rule 41(b), invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that FCC authorizations to a new class of carriers to provide "specialized" common carrier communications services conferred unlimited authority to provide all common carrier services.

STATUTES INVOLVED

The pertinent provisions of the Communications Act involved in this case appear as Appendix C.

² To avoid burdening the Court with duplicative documents, petitioner USITA will herein adopt and refer to the AT&T Appendix as "Pet. App."

STATEMENT OF THE CASE

A. Before The Federal Communications Commission.

In 1969, after evidentiary hearing, FCC granted authorization to Microwave Communications, Inc. (MCI) to construct a microwave radio line between Chicago, Illinois and St. Louis, Missouri for the purpose of offering "specialized" private line common carrier communications services, represented to be not then offered by or available from existing common carriers.³

In 1970, having received a substantial number of applications for authority to construct microwave facilities for the rendition of "specialized" services, FCC elected to proceed by general rulemaking, rather than considering each of the pending applications on its individual merits. This proceeding culminated in the Commission's 1971 *Specialized Carriers* decision,⁴ in which FCC found and determined, as a matter of general policy, that the public interest would be served by the creation of a new class of "specialized" carriers, whose applications would be routinely processed and approved under the new general policy, without requiring specific public interest findings in each case. Promulgation of this general policy essentially permitted open entry into "[t]he business . . . of providing specialized private or leased line communication services through a microwave transmission facility as distinguished from public exchange and long distance

³ *MCI*, 18 FCC 2d 953 (1969); *recon. den.*, 21 FCC 2d 190 (1970).

⁴ *Specialized Common Carriers*, 29 FCC 2d 870 (1971); *recon. den.* 31 FCC 2d 1106 (1971).

toll telephone service.”⁵ Numerous applications by MCI and other specialized carriers were granted under this general policy of open entry, and many microwave facilities were constructed and put in operation.

In 1975, allegedly pursuant to a 1974 tariff filing offering “metered use service,” MCI began marketing a communications service it called “Execunet.” With Execunet, a customer dials an ordinary exchange telephone call to an MCI facility, dials his customer code, and then dials the telephone company area code and telephone number of any telephone in any distant city served by MCI. On completion of the Execunet telephone call, the customer is billed a per-minute toll charge. Connection and monthly minimum charges are also involved in Execunet service.

After an exchange of correspondence among FCC, AT&T, and MCI, the FCC issued a letter order on July 2, 1975⁶ finding Execunet to be not “specialized” but an unauthorized switched public message telephone service.⁷ Following further proceedings before the Commission in 1976, including the filing of comments and reply comments and the holding of oral argument before the Commission *en banc*, the FCC issued an extensive opinion,⁸ again finding Execunet to be beyond

⁵ *Washington Utilities & Transportation Com. v. FCC*, 513 F.2d 1142, 1155 (9th Cir. 1975); *cert. den.* 423 U.S. 836 (1975).

⁶ This order is Appendix B to the FCC’s July 13, 1976 Order (60 FCC 2d 25; Pet. App. 70b-75b).

⁷ MCI sought judicial review of the 1975 letter order, but the case was held in abeyance to afford the Commission an opportunity to consider MCI arguments first presented to the court.

⁸ 60 FCC 2d 25 (1976); Pet. App. 1b-61b.

MCI’s authorizations. Essential to the Commission’s conclusion were its findings (1) that MCI had sought and had been granted authority to provide private line services only; and (2) that MCI’s Execunet service had all of the essential characteristics of message telephone service, but none of the characteristics of private line service.

B. In the Court Below.

Although the MCI petition for review of the 1975 FCC letter order was held in abeyance, its motion for stay of that order was initially granted by the court below. Stay was subsequently modified to permit MCI to continue serving existing Execunet customers, but not to expand the service to new customers or new locations. The court below, in its July 28, 1977 decision, considered both the 1975 letter order and the 1976 in-depth opinion issued by the FCC.

The court below began its analysis of the FCC action by characterizing it as “represent[ing] a substantial departure from prior administrative practice.”⁹ In the court’s view, FCC authorizations to provide common carrier communications services are necessarily unlimited unless expressly and affirmatively restricted, and FCC’s power to restrict its grants is found exclusively in Section 214(c) of the Communications Act.¹⁰

The basic rationale of the lower court’s opinion is found not in its text, but in the final two sentences of

⁹ *Slip. op.*, p. 16; Pet. App. 16a.

¹⁰ *Slip. op.*, pp. 24-28; Pet. App. 24a-28a. Section 214(c) (47 U.S.C. 214) empowers the FCC to grant certificates “as applied for” or in part, and to attach terms and conditions to its grants. Pet. App. 7c.

its footnote 59¹¹ where, after reviewing decisions from other circuits involving the validity and scope of the FCC *Specialized Carriers* decision, the court below concludes:

"*Bell Telephone* therefore stands for the proposition that the Commission in *Specialized Carriers* decided at least that specialized carriers could provide all private line services. However, one cannot reason from this proposition to its converse—that specialized carriers may offer only private line services—yet the converse is the issue relevant under § 214(c) as we explain in text."¹²

REASONS FOR GRANTING THE WRIT

In its ingenious and innovative opinion, the court below has:

- 1) rendered a decision in irreconcilable conflict with decisions of other circuits in specialized carrier proceedings;
- 2) overstepped the permissible bounds of judicial review; and
- 3) created a significant Federal question concerning the validity of thousands of FCC authorizations under what the Commission believed was long and well established FCC policy and practice.

I. There Is A Clear And Direct Conflict Between Circuits.

The FCC's *Specialized Carrier* decision has been the subject of exhaustive scrutiny by both the Ninth and

¹¹ *Slip. op.*, p. 27; Pet. App. 26a.

¹² *Ibid.*

the Third Circuits. In each case, the reviewing court experienced no difficulty in concluding that specialized carriers were authorized to offer private line services but were not authorized to provide plain old message telephone service. Thus the holding of the court below that specialized carriers are free to offer plain old message telephone service is in clear and direct conflict with at least the holdings of the other two circuits.

In *Washington Utilities & Transportation Commission v. FCC*,¹³ at issue was the basic legality of the Commission's *Specialized Carrier* decision. Necessarily essential to resolution of that basic issue was the scope of the FCC's order establishing the new class of specialized carriers, and whether the Commission's conclusion that construction of facilities by the new carriers was required by the public convenience and necessity was adequately supported.

That the *Washington Commission* court fully and clearly understand the scope of the FCC order is readily apparent from its succinct definition of specialized services:

"The business involved is that of providing *specialized private or leased line* communications services . . . as distinguished from public exchange and long distance toll telephone service" (emphasis supplied).¹⁴

Similarly clear and unambiguous is the court's analysis of the FCC's findings in support of the Commission's

¹³ 513 F.2d 1142 (9th Cir. 1975); *cert. den.* 423 U.S. 836 (1975).

¹⁴ 513 F.2d at 1155. That this distinction was widely understood by all concerned is evident from representations made to this Court in oppositions to petitions for certiorari in both the Ninth and the Third circuit cases. Pet. App. 125b-141b.

ultimate public convenience and necessity conclusion. Applying the standards established by this Court in *FCC v. RCA Communications Inc.*,¹⁵ the Ninth Circuit upheld the Commission's findings that a public need and demand for *specialized* services existed, and that because of the small and limited portion of the communications market that would be opened to competition from the new class of *specialized* carriers, existing carriers would not be adversely affected. Inasmuch as the record before the Commission and the public interest findings before the court were clearly limited to *specialized* services, had the court considered the Commission's decision to purport to authorize all services, without limit, summary reversal would have been appropriate.

The scope of the FCC *Specialized Carrier* decision was subjected to even more detailed scrutiny by the Third Circuit in *Bell Telephone Company of Pennsylvania v. FCC*,¹⁶ where the basic issue before the court was whether the furnishing of communication services known as "FX" (foreign exchange) and "CCSA" (common control switching arrangement) was within the authorization granted to *specialized* carriers. In rejecting the contention by telephone companies that provision of FX and CCSA services by the *specialized* carriers was an unwarranted enlargement of the scope of the Commission's *Specialized Carrier* decision, the *Bell Telephone* court, taking as its criterion the category of services classified as private line by the Commission, found FX and CCSA to be within the private line category and therefore authorized by

¹⁵ 346 U.S. 86 (1953).

¹⁶ 503 F.2d 1250 (3d Cir. 1974); *cert. den.*, 422 U.S. 1026 (1975).

the Commission's *Specialized Carrier* decision. Again here, as in the Ninth Circuit decision, the court found the Commission's analysis of the limited market impact of the new *specialized* carriers persuasive as to the scope of the authorizations granted.

The meticulous and thorough review by the Third Circuit of the parameters of private line service, and its conclusion that FX and CCSA services fell within those parameters, lend themselves to no other logical conclusion but that the category of private line services establishes the boundary beyond which *specialized* carriers are not authorized to operate. Were this not so, *i.e.*, had the *specialized* carriers authorizations included both private line and all other services (*e.g.*, message toll telephone), then the entire rationale of the Third Circuit decision and its meticulous delineation of the limited private line service category is unnecessary and without meaning.

Indeed, the Third Circuit's rejection of contentions that the FCC order before it on review was vague and overbroad is singularly enlightening on this point. According to the court, although the FCC order "on its face . . . gives little guidance as to the types of services that AT&T will be required to provide [to MCI] 'hereafter'" (503 F.2d at 1273), the court concluded that read in context, "the FCC has required AT&T to provide to the *specialized carriers those (interconnection) elements of private line services* which AT&T supplies to its affiliates and furnishes to customers through its Long Lines Department" (*Ibid.* at 1273-1274) (emphasis supplied).

Not only have the Ninth and Third Circuits had occasion to review the scope of the FCC's *Specialized*

Carrier decision, but so too has the District of Columbia Circuit itself. Only a year ago, in *AT&T v. FCC*,¹⁷ the D.C. Circuit affirmed an FCC decision authorizing U.S. Transmission Systems (a subsidiary of International Telephone & Telegraph Co.) to construct a microwave system for the purpose of offering specialized services. Noting with approval both the Ninth and Third Circuit decisions, and specifically recognizing that the issue before both courts was the scope of the *Specialized Carriers* decision, the D.C. Circuit acknowledged the Commission's decision in *Specialized Carriers* to be "that the public interest, convenience and necessity would be served by permitting specialized common carriers to provide a full range of private line communications services. . . ." ¹⁸

Given the in-depth analysis of *Specialized Carriers* by the Ninth and Third Circuits, and the D.C. Circuit's own iterated acknowledgment of what that decision authorized, the direct conflict among circuits is apparent. The footnote effort by the court below to avoid this clear conflict by asserting that the issues in other cases were different is patently erroneous; and with deference, the asserted inability to reason from the scope of the grant itself to its obvious limitation approaches sophism. It is quite clear that contrary to the court's impression that the Commission's Execunet decision represented a departure from prior admin-

¹⁷ 539 F.2d 767 (D.C. Cir. 1976).

¹⁸ 539 F.2d at 773-774. See also *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975) where the court (at 187) recognized that "MTS and WATS are essentially monopoly services AT&T's [other] interstate revenue accrues from private line service Unlike MTS and WATS, several specialized carriers, including MCI, compete with AT&T in this part of the market."

istrative practice, the Commission's decision here was wholly consistent with its own and with judicial construction of its *Specialized Carrier* decision since 1971.

II. The Court Below Overstepped The Bounds Of Judicial Review.

It is axiomatic that judicial review of agency action must be based on the agency's action and its rationale, not on what a reviewing court thinks the agency should have done or said.¹⁹ Equally well settled is the corollary to this axiom, *i.e.*, that the reviewing court may not substitute its opinion as to what the agency decision should have been for what the agency itself decided.²⁰

In the case below, however, the court's result-oriented decision has substituted its own judgment for that of the Commission, summarily discarded the Commission's rationale for its action, devised its own theory of what the agency should have done, and declined to accord even the normal deference to an agency's interpretation of its own decisions²¹ simply because the FCC did not do or say what the court thought it should

¹⁹ *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 169 (1972). *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

²⁰ See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

²¹ *Slip op.*, p. 30, n.67; Pet. App. 29a; *cf. MCI Communications Corp. v. AT&T*, 496 F.2d 214 (3d Cir. 1974), where the court vacated a district court ruling ordering provision of AT&T facilities to MCI, pointing out that under the primary jurisdiction doctrine it was for FCC, not the court, to determine "exactly what private line services had been authorized by the FCC" (496 F.2d at 222). And as this Court concluded in *Chenery, supra*,

"The Commission's conclusion here rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts" (332 U.S. at 209).

have done or said, or did not reach the result that the court below thought proper.

Underlying the court's novel approach to the FCC's Section 214 certification authority and its procedures, an approach original with the court, appears to be a new theory that all grants of certificates of public convenience and necessity by the Commission are and must be unlimited, unless affirmatively restricted. Curiously, the court below finds support for its theory not in what the Commission itself did or said in *Specialized Carriers*, but in its own selected excerpts from a Commission staff report in *Specialized Carriers*, which the Court erroneously construes as relating to services not before the Commission in that case.²²

But as the court itself acknowledges, "We can assume, without deciding, that a service like Execunet was not within the contemplation of the Commission when it made the *Specialized Carrier* decision."²³ Adoption by the Commission of the staff report, adverted to by the court below,²⁴ itself demonstrates that the area of contemplation of both the Commission and its staff were identical, and that the staff comments selected by the court below necessarily related to the service offerings before the Commission in *Specialized Carriers*, not to some other undefined services not there considered.

Equally flawed are the efforts by the court below to find support for its conclusions in its own theories of the import of "instruments of authorization" and of the meaning of the Commission's nondecision in FCC Docket No. 19117, theories apparently underlying the

²² *Slip op.*, p. 29; Pet. App. 28a.

²³ *Slip op.*, p. 27; Pet. App. 26a.

²⁴ *Slip op.*, p. 29, n.64; Pet. App. 28a.

court's conclusion that past Commission practice recognized the court's new affirmative restriction doctrine.²⁵

Whatever the import of "instruments of authorization" at other times or in other services (the instrument itself is a preprinted form (FCC Form 462-B), on which little if anything other than radio specifications are typed or computer printed), it is clear beyond question here that the Commission itself, all parties to its proceedings, and the Ninth, Third and District of Columbia Circuits all considered the *Specialized Carrier* decision as having clearly established the limited parameters of all instruments of authorization issued pursuant to that decision. In short, specialized carriers were authorized to provide private line and only private line services.

With regard to FCC Docket No. 19117, what the court below appears to have overlooked is that the stated purpose of that proceeding was to equalize the competitive position of the new specialized entrants, who required certification, with that of the existing carriers having existing facilities. It is quite clear that the purpose of Docket No. 19117 was not to authorize specialized carriers to provide message toll telephone service, nor did termination of the Docket No. 19117 proceeding without decision have that result. Moreover, a nondecision can hardly be said to establish a pattern of prior administrative practice.

Thus it is clear that in substituting its own conclusion and constructing its own ingenious rationale in this case, the court below has not only exceeded all limits of judicial review, but its own conclusion and rationale are grievously in error.

²⁵ *Slip op.*, pp. 16-17, Pet. App. 16a.

III. The Decision Below Would Have Incredible Consequences.

If the court below is correct, the FCC has unwittingly created and issued thousands of authorizations to over 30 new telephone companies in the past seven years, in each case without the slightest attention to or consideration of whether the public interest, convenience and necessity require or would be served by its action. Indeed, the absence of a single public interest finding in support of the establishment of 30 new United States telephone companies would strongly suggest the invalidity of all of these authorizations, if indeed unlimited as the court below found.²⁶ Yet affirmance of these now judicially found to be unlimited grants, concededly without administrative or judicial consideration of the public interest,²⁷ is the result of the court's holding that absent specific affirmative action by the Commission prohibiting the offering of services not contemplated by the Commission and for which authority was not sought by the applicant, all grants are unlimited.

That there is something fundamentally wrong with this result, particularly in this case, is further evidenced by the fact that before, during, and after *Specialized Carriers*, MCI and other specialized carriers repeatedly and emphatically advised the Commission that the services for which they sought authorization were new, innovative, and not available from already existing carriers.²⁸ MCI itself, in fact, repeatedly as-

²⁶ That 30 new telephone companies serving this country are not required by the public interest, convenience and necessity is a matter worthy of judicial notice.

²⁷ *Slip. op.*, p. 32; Pet. App. 31a.

²⁸ Quite serious questions of misrepresentation are raised by the original assertion, on the basis of which the FCC general policy

sured the Commission and the courts that it did not seek to enter the switched voice service and provide long distance toll telephone service (MTS). As the Commission found,

"According to MCI, the 'real distinction which delineates MCI service from anything provided today by existing common carriers is . . . the manner in which a customer may utilize it [MCI service] in order to provide a customized intra-company point-to-point communications system . . .'" (*Specialized Carriers, supra*, at 874).

Again, in its briefs in the original MCI case (18 FCC 2d 953 (1969)), MCI asserted in support of its requested authorization that "MCI will not provide a toll exchange telephone service." Again "MCI emphasizes that it is not seeking to become a public telephone exchange company" (*Ibid.*). And "MCI would

was adopted, that specialized carriers proposed to offer services not available from existing carriers (see *Specialized Carriers, supra*). Having secured authorization for the purpose of offering new specialized services, the specialized carriers next shifted to the assertion that they should be allowed to offer all private line services then available from existing carriers. This gambit having been successful (see *Bell Telephone, supra*), the specialized carriers now assert that they are authorized to provide plain old telephone service, a service neither new, nor not available from existing carriers, nor specialized, nor private line. Surely, after-thought expansion of authorization by ingenious advocacy does not and can not meet the standard of public interest, convenience and necessity prescribed by the Communications Act of 1934. And it is undisputed and indeed indisputable that the FCC has never found that the public interest requires the provision of plain old telephone service by specialized carriers. Thus, either the Commission is naive beyond belief, or it is the victim of serious misrepresentation by applicants for its authorizations. In either event, however, not even MCI claims affirmative authorization by the Commission to offer message toll telephone service.

not offer public telephone exchange services, that is, MCI customers would not use MCI facilities to call any member of the general public" (*Ibid.*) (Pet. App. 107b-110b).

Similar representations (or misrepresentations) were made to the courts that reviewed the *Specialized Carrier* decision (*supra*, n.14). Surely, the Commission (and the courts) are entitled to rely, as indeed they did²⁹ to substantial degree, on representations made by applicants; and when applications are granted "as applied for,"³⁰ it approaches the absurd to require, as would the court below, that the Commission also affirmatively find a negative, with support in a nonexistent record, that it is not in the public interest to grant authority not only not requested but expressly disclaimed.

If the Commission is to carry out effectively and efficiently its affirmative statutory mandate, *i.e.*, "to make available . . . to all of the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate

²⁹ In the six years since the *Specialized Carrier* decision, the Commission has consistently and repeatedly expressed its conviction that it had authorized *specialized carriers* to provide *only* private line services. These expressions are found not only in its decisions, but in public utterances and in representations to the Congress (see, *e.g.*, Statement of FCC Chairman Wiley, House Hearings, 94th Cong., 1st Sess. 46, March 11, 1975—"the competition we have introduced has been in the private line and not the message toll service"). And as shown above, the private line only scope of *Specialized Carriers* has been recognized by the Ninth Circuit, twice by the Third Circuit, and twice by the District of Columbia Circuit. Thus if the *Execunet* case indeed involved a departure from past practice, the cornerstone of the opinion below, that departure was by MCI and the court below, not by FCC.

³⁰ Section 214(c); Pet. App. 7c.

facilities at reasonable charges,"³¹ the Commission must be able to make the affirmative finding required by its Section 214 on the basis of the application before it, *i.e.*, that the public convenience and necessity require the construction or operation of the applied for interstate facilities for the purposes designated by the applicant. To require, as would the court below, the development of a record covering all services not applied for, in support of a nonstatutory, negative public interest finding not only stands the statute on its head but is tantamount to a reversal of the Court's landmark decision in *RCA, supra*, for under that decision it is the Commission's charge to regulate entry, not non-entry, into the field of common carrier communications.

CONCLUSION

For the reasons assigned, a writ of certiorari should issue to the Court of Appeals for the District of Columbia Circuit, and this case set for plenary review.

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³¹ Communications Act, Sec. 1; 47 U.S.C. § 151.